82-717

Office - Supreme Court, U.S.
FILED
OCT 19 1982
ALEXANDER L. STEVAS
CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1982

TERRACE WEST, INC.,
Petitioner,

against

THE CITY OF PLATTSBURGH, NEW YORK,
Respondent,

and

THE STATE OF NEW YORK,
Intervenor.

ON APPEAL FROM THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI

J. BYRON O'CONNELL
O'CONNELL & WOLFE
Attorneys for Petitioner
10 Healey Avenue
Plattsburgh, NY 12901
(518) 561-1440

Question Presented.

Are Articles 2 and 4 of the New York State Eminent Domain Procedure Law facially and in fact unconstitutional in that they permit a taking of private lands without due process, without allowing the private landowner the right to an impartial hearing before an impartial arbitrator on the issue of whether his property need be taken, or, in other words, does the Due Process Clause apply to property owners as well as to felons?

Table of Contents.

	Page
Questions Presented	i
Opinions Below	1
Grounds for Jurisdiction	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	12
Reasons for Granting the Writ	16

Index to Appendix.

Court of Appeals Order, September 8, 1982	A1
Appellate Division Order, May 18, 1982	A3
Appellate Division Decision, May 11, 1982	A5
Appellate Division Order, March 30, 1982	A6
Appellate Division Decision, March 25, 1982	A8
Order Appealed From, June 5, 1981	A11
Memorandum Decision and Order, U. S. District Court for Northern District of New York, July 18, 1980	A15
Appellate Division Order, February 25, 1980	A24

Page

Appellate Division Decision, February 7, 1980..... A26

Appellate Division Order, January 14, 1980..... A27

Appellate Division Decision, December 20, 1979... A29

Minutes of Public Hearing..... A31

Public Notice of Determination and Findings..... A56

Determination and Findings..... A58

Resolution..... A61

Minutes of Resolution..... A64

TABLE OF AUTHORITIES.

CASES CITED:

Missouri P.R. Co. v. Mackey, 127 U.S. 205 16

Re Kimmler, 136 U.S. 436 16

San Diego Gas & Electric Company v. City of San Diego, 450 U.S. 621 15

U.S. v. Reynolds, 397 U.S. 14 17

CONSTITUTIONAL PROVISIONS AND STATUTES CITED:

United States Constitution, Fourteenth Amendment 3

New York Eminent Domain Procedure Law:

Page

Section 201 3

Section 202 4

Section 203 4

Section 204 5

Section 207 6

Section 402 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

TERRACE WEST, Inc.,

Petitioner,

against

THE CITY OF PLATTSBURGH, NEW YORK,

Respondent,

and

THE STATE OF NEW YORK,

Intervenor.

ON APPEAL FROM THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK.

Petition for Certiorari.

Opinions Below.

Petitioner, Terrace West, Inc., first appealed in this action following the publication by the respondent, City of

Plattsburgh, of its determination and findings in this matter, and its resolution deciding that the taking was proper. The Appellate Division, Third Department's decision affirming the determination is reported at 73 A. D. 2d 763, 423 N. Y. S. 2d 296. The subsequent decision denying petitioner's motion for re-argument is not reported. The decision of the Appellate Division affirming the order permitting the respondent City of Plattsburgh to file an acquisition map is reported at ____ A. D. 2d ____, 499 N. Y. S. 2d 343. The decision of the Appellate Division denying petitioner's motion for re-argument or, in the alternative, for leave to appeal to the Court of Appeals is not yet reported; neither is the decision of the Court of Appeals of the State of New York denying petitioner leave to appeal to that Court.

The memorandum-decision and order of the United States District Court, Northern District of New York, dismissing plaintiff Terrace West, Inc.'s complaint is not reported. Copies of all of these are annexed hereto as part of the Appendix.

Grounds for Jurisdiction.

The decision sought to be reviewed is that of the Appellate Division, Third Department, dated March 25, 1982. An order was entered thereon on March 30, 1982. Terrace West, Inc.'s motion to the Appellate Division for leave to re-argue, or, in the alternative, for leave to appeal to the Court of Appeals was denied by decision dated May 11, 1982, the order thereon was entered May 18, 1982. Petitioner's motion to the Court of Appeals for leave to appeal to that Court was denied by order dated and entered September 8, 1982. The jurisdiction of this Court is pursuant to 28 U. S. C. 1257 (3).

Constitutional Provisions and Statutes Involved.

United States Constitution, Fourteenth Amendment, Section 1:

> Section 1. Citizens of the United States.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Eminent Domain Procedure Law:

> §201. Public hearings
>
> Except as provided herein, prior to acquisition, the condemnor, in order to inform the public and to review the public use to be served by a proposed public project and the impact on the environment and residents of the locality where such project will be constructed, shall conduct a public hearing in accordance with the provisions of this article at a location reasonably accessible to the property owners whose property might be acquired for such project.

§202. Notice

(A) Where a public hearing is required by this article the condemnor shall give notice to the public of the purpose, time and location of its hearing setting forth the proposed location of the public project including any proposed alternate locations, at least ten but no more than thirty days prior to such public hearing by causing such notice to be published in at least five successive issues of an official daily newspaper if there is one designated in the locality where the project will be situated and in at least five successive issues of a daily newspaper of general circulation in such locality.

(B) In the event that the only newspaper available in such locality is a weekly publication the above described notice shall be published in such newspaper in at least two successive issues.

(C) Failure to notify a person or persons entitled to notice under this section shall not be jurisdictional nor construed to affect the validity of any title acquired by a condemnor under this law.

§203. Conduct of the public hearing

At the public hearing the condemnor shall outline the purpose, proposed location or alternate locations of the public project and any other information it considers pertinent, including maps and property descriptions of the property to be acquired and adjacent parcels. Thereafter, any person in attendance shall be given a reasonable opportunity to present an oral or written statement and to submit other documents concerning the proposed public project. A record of the hearing shall

be kept, including written statements submitted. The condemnor's copy of such record shall be available during normal business hours, at its principal and district offices to the public for examination without cost and shall be reproduced upon written request and payment of the cost thereof. Further adjourned hearings may be scheduled.

§204. Determination and findings

(A) The condemnor, within ninety days after the conclusion of the public hearings held pursuant to this article, shall make its determination and findings concerning the proposed public project and shall publish a brief synopsis of such determination and findings in at least two successive issues of an official newspaper if there is one designated in the locality where the project will be situated and in at least two successive issues of a newspaper of general circulation in such locality. The synopsis shall include those factors set forth in subdivision (B) herein, and shall also state that copies of the determination and findings will be forwarded upon written request without cost.

(B) The condemnor, in its determination and findings, shall specify, but shall not be limited to the following:

(1) the public use, benefit or purpose to be served by the proposed public project;

(2) the approximate location for the proposed public project and the reasons for the selection of that location;

(3) the general effect of the proposed project on the environment and residents of the locality;

(4) such other factors as it considers relevant.

§207. Judicial Review

(A) Any person or persons jointly or severally, aggrieved by the condemnor's determination and findings made pursuant to this article, may seek judicial review thereof by the appellate division of the supreme court, in the judicial department embracing the county wherein the proposed facility is located by the filing of a petition in such court within thirty days after the condemnor's completion of its publication of its determination and findings pursuant to section two hundred four herein. Such petition shall be accompanied by proof of service of a demand on the condemnor to file with said court a copy of a written transcript of the record of the proceeding before it, and a copy of its determination and findings. Upon receipt of such petition and demand, the condemnor shall forthwith deliver to the court a copy of the record and a copy of its determination and findings. The proceeding shall be heard on the record without requirement of reproduction. If such proposed public improvement is located in more than one judicial department such proceeding may be brought in any one, but only one of such departments and all such proceedings with relation to any single public project shall be consolidated with the first filed.

(B) The jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final subject to review by

the court of appeals in the same manner and form and with the same effect as provided for appeals in a special proceeding. All such proceedings shall be heard and determined by the appellate division of the supreme court, and by the court of appeals, as expeditiously as possible and with lawful preference over other matters.

(C) The court shall either confirm or reject the condemnor's determination and findings. The scope of review shall be limited to whether:

(1) the proceeding was in conformity with the federal and state constitutions,

(2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority,

(3) the condemnor's determination and findings were made in accordance with procedures set forth in this article, including, where applicable, a determination that an acquisition is exempt from compliance with this article, and

(4) a public use will be served by the proposed acquisition.

§402. Filing of acquisition maps; vesting

* * *

(B) In all acquisitions under supreme court jurisdiction provided in subdivision (B) of section five hundred one herein, the condemnor, prior to filing an acquisition map within the time prescribed

by section four hundred one, shall obtain an order to acquire such property and for permission to file such map by presentation of a verified petition to the supreme court in the judicial district where the real property to be acquired or any part thereof, is situated, in accordance with the following procedure:

(1) The condemnor shall cause to be filed in the office of the clerk of each county where the real property to be acquired or any part thereof is situated, a notice of the pendency of such proceeding. Such notice shall briefly state the object of the proceeding and shall contain a general description by metes and bounds or by section, block and lot number of the real property to be acquired thereby. It shall also state the names of such of the reputed condemnees of such real property as may be known to the condemnor, and in case any of the condemnees are unknown, a statement to that effect shall be made in such notice.

(2) The condemnor shall, at least twenty days prior to the return date of the petition, serve by registered or certified mail return receipt requested, a notice of the time, place and object of the proceeding upon the last known owner or owners of record of the property to be acquired, as the same appears from the record of the tax assessor of the district wherein such parcel or parcels are located. Said notice shall contain a copy of that portion of the proposed acquisition map affecting the owner's property. At least ten but not more than thirty days before the return date of the application, the condemnor shall also cause a copy of a diagram or

representation of the acquisition map showing the perimeters to be acquired and a notice generally describing the property to be acquired by metes and bounds or by section, block and lot numbers, to be advertised by publishing in at least ten successive issues of an official newspaper if there is one designated in the locality where the property is situated, and in at least ten successive issues of a newspaper of general circulation in such locality. In the event that the only newspaper available in such locality is a weekly publication the above described notice shall be published in such newspaper in at least three successive issues. Where the condemnor has conducted an article two public hearing or when the condemnor is exempt from compliance with article two pursuant to section two hundred six the condemnor may dispense with the requirement of publication in ten successive issues of a newspaper of general circulation. Where practicable, the condemnor shall cause copies of such notice in the form of handbills to be posted for the same period in at least three conspicuous places, upon or near such real property. The inadvertent failure to notify any condemnee, whether of record or not, will not invalidate any proceedings brought hereunder or any title acquired by the condemnor under this law.

(3) The condemnor shall present to the Court a petition verified by an authorized officer of the condemnor setting forth:

(a) a statement providing either the compliance with the requirements of article two of this law, including a copy of the condemnor's determination

and findings or a statement providing the basis of exemption from article two;

(b) a copy of the proposed acquisition map to be filed and the names and places of residence of the owners of the property to be acquired;

(c) a description of the real property to be acquired and its location, either by metes and bounds of each individual parcel, or section, block and lot number, and by reference to the acquisition map and notice of pendency attached to the petition;

(d) the public use for which the property is required;

(e) a request that the court direct entry of an order authorizing the filing of the acquisition map in the office of the appropriate county clerk or register and that upon such filing, title shall vest in the condemnor;

(f) if a non-governmental condemnor subject to the jurisdiction, supervision and regulation of the public service commission or the commissioner of transportation, it shall include in its petition for acquisition, notice that it shall deposit a bond or undertaking with the clerk of the court prior to vesting of title to the real property described in such petition in an amount to be fixed by the court on the return date of the petition. The court shall direct that the bond or undertaking will be applied in the amount necessary, for any default by the condemnor in the payment of all or part of the damages determined in the acquisition proceeding or the abandonment thereof.

The requirement for a bond or undertaking under this subdivision, may be waived by stipulation of the parties. If the amount deposited is insufficient to pay such damages and all costs and expenses awarded to a condemnee, judgment shall be entered against the condemnor for the deficiency, to be enforced and collected in the same manner as a judgment in the supreme court;

(g) if the property is to be used for the construction of a major utility transmission facility, as defined in section one hundred twenty of the public service law, or major steam electric generating facility as defined in section one hundred forty of such law with respect to which a certificate of environmental compatibility and public need has been issued under such law, a statement that such certificate relating to such property has been issued and is in force.

(4) Upon the presentation of the petition and notice with proof of service thereof, an owner of the property may appear and interpose a verified answer, which must contain specific denial of each material allegation of the petition controverted by him, or of any knowledge or information thereof, sufficient to form a belief, or a statement of new matter constituting a defense to the proceeding.

(5) At the time and place mentioned in such notice, unless the court shall adjourn the application to a subsequent date, and in that event at the time and place to which the same may be adjourned, upon due proof of service of notice and upon filing of such petition and proof to its

satisfaction that the procedural requirements of this law have been met, the court shall direct the immediate filing and entry of the order granting the petition, which order the condemnor shall file and enter together with the acquisition map, in the office of the county clerk or register in each county in which the real property or any part thereof is situated. Upon the filing of the order and the acquisition map, the acquisition of the property in such map shall be complete and title to such property shall then be vested in the condemnor.

* * *

Statement of the Case.

The respondent City of Plattsburgh, New York, has taken from the petitioner Terrace West, Inc., a parcel of land. This taking, done in conformity with the Eminent Domain Procedure Law of the State of New York, is in blatant violation of petitioner's constitutional right to due process in the taking of life, liberty or property; therefore, the New York State Eminent Domain Procedure Law is unconstitutional and must be struck down and the taking reversed.

The parcel of land at issue here is a strip sixty-six feet wide, 310 feet long on its southern boundary, 320 feet long on its northern boundary, owned by petitioner Terrace West, Inc. At the time the proceedings under the EDPL began, it was an unpaved, private driveway, adjacent to petitioner's apartment complex, Terrace West. The respondent City of Plattsburgh sought to acquire this parcel to make into a City street. Pursuant to the relevant sections of the EDPL, §201-203, a public hearing was held in the Common Council Chambers, City Hall, Plattsburgh,

New York, on July 26, 1979, to discuss the proposed taking, the "Sandra Avenue Improvement Project" (the minutes of that Public hearing are annexed hereto as A-31). EDPL §201 requires a public hearing to be conducted by the condemnor prior to acquisition, "in order to inform the public and to review the public use to be served by a proposed public project and the impact on the environment and residents of the locality." §202 sets forth the procedures to be followed in giving notice of the hearing. §203 provides for the conduct of the public hearing, and requires the condemnor to outline the project, proposed location and other pertinent information. "Thereafter, any person in attendance shall be given a reasonable opportunity to present an oral or written statement and to submit other documents concerning the proposed public project." The public hearing was conducted by the Mayor of the City of Plattsburgh, with the City Aldermen and concerned citizens present, including the attorney for a private developer to whom the acquisition would be a benefit and who had already offered the City $5,000 as reimbursement for expenses anticipated in acquiring this property and in extending the existing water main. Louis E. Wolfe, the President of Terrace West, Inc., had submitted a statement in opposition to the taking, which was read into the minutes by the Mayor.

On August 16, 1979, the Condemnor City of Plattsburgh made its determination pursuant to EDPL §204, which requires a synopsis as to the public use, benefit or purpose to be served by the proposed public taking, the location and reasons for the selection of the location, the general effect of the proposed project on the environment and residents of the locality and such other factors as it considers relevant (A-56). Also on that date, at a regular meeting of the Common Council of the City of Plattsburgh, a resolution was adopted which resolved that the

respondent "City of Plattsburgh, in accordance with the findings of the Common Council does hereby agree to acquire the subject property for the purposes stated, and the findings of the Common Council are hereby adopted * * * [and] the Corporation Counsel is hereby authorized and directed to proceed with the acquisition of the Terrace West/Sandra Avenue property under the provisions of the Eminent Domain Procedures Law." The resolution further provided for a copy of the resolution to be furnished the private developer (A-61).

Terrace West, Inc., then made application to the Supreme Court of the State of New York, Appellate Division, Third Department, pursuant to §207 of the EDPL, for a judgment rejecting and annulling the findings of the City of Plattsburgh relative to the proposed Sandra Avenue Improvement Project. The application was returnable before the Appellate Division on October 29, 1979. By decision dated December 20, 1979, the Appellate Division confirmed the determination and dismissed Terrace West's petition (A-29). Terrace West, Inc., then moved in the Appellate Division for leave to reargue, "upon the ground that the statute upon which the matter was originally decided, the New York Eminent Domain Procedure Law is unconstitutional because it does not provide for an evidentiary hearing by an impartial tribunal prior to the taking as to whether or not the taking is a private taking or public taking, thus violating the due process clauses of both the New York Constitution and the United States Constitution * * *" By decision dated February 7, 1980, the Appellate Division denied the motion for re-argument (A-26). Terrace West, Inc., then began an action in the United States District Court for the Northern District of New York against the City of Plattsburgh, pursuant to 42 U. S. C. §1983, seeking a declaration from that Court that Article 2 of the New York State

Eminent Domain Procedure Law was unconstitutional, and requesting an injunction against the City enjoining it from taking any actions which would further impair its rights in the private road. That Court held, in a memorandum-decision and order dated July 18, 1980, that the challenge to the constitutionality had been raised and "necessarily decided" by the State Courts; that it could not view the silence of the State Courts on the subject of the constitutionality as a failure on their part to address and decide the issue; and that since Terrace West failed to seek review in the United States Supreme Court, that Court "was precluded from deciding the issue anew" (A-15). A notice of appeal to the Second Circuit was filed, but the appeal was not perfected, as Petitioner decided the action was premature as no taking had yet occurred; this decision on the part of Petitioner was confirmed by the Supreme Court's subsequent decision in *San Diego Gas & Electric Company v. City of San Diego,* 450 U.S. 621, 67 L. Ed. 2d 551.

The City of Plattsburgh then moved in the Supreme Court of the State of New York, County of Clinton, pursuant to EDPL §402, for "permission to file an acquisition map in the Office of the Clerk of the County of Clinton, and upon granting of said order, for vesting of title of certain property" in the City. §402 (B) provides for the acquisition of the lands and vesting of title. It requires the condemnor to obtain an order, from the Supreme Court in the judicial district in which the property is situated, to acquire such property and for permission to file an acquisition map. §402 (B) (5) provides that, upon due proof of service of notice and upon the filing of the petition of the condemnor and "proof to its satisfaction that the procedural requirements of this law have been met, the Court shall direct the immediate filing and entry of the order granting the petition * * * Upon the filing of the Order and the acquisition map, the acquisition of the property in such map shall be complete and title to such property shall then be vested in the condemnor."

Over the opposition of Terrace West, Inc., the petition was granted by order dated June 5, 1981 (A-11). Terrace West, Inc., appealed this decision to the Appellate Division, Third Department, again arguing the unconstitutionality of the Eminent Domain Procedure Law, and further raising the point that this issue had not properly been before the Court previously, as no taking had occurred, citing *San Diego Gas & Electric Company v. City of San Diego, supra.* The Appellate Division, by Decision dated March 25, 1982 affirmed the order (A-8), Terrace West, Inc., then moved in the Appellate Division for leave to reargue, or in the alternative, for leave to appeal to the Court of Appeals. This motion was denied by order dated and entered May 18, 1982 (A-5). Petitioner then made a motion in the Court of Appeals for leave to appeal to that Court. This motion was denied by order dated and entered September 8, 1982 (A-1).

Reasons for Granting the Writ.

The sections of the Eminent Domain Procedure Law cited above are in violation of a landowner's, more specifically, in this instance, Terrace West, Inc.'s constitutionally guaranteed right to due process in actions involving a possible deprivation of property, under the Fourteenth Amendment. Due process, within the meaning of the Fourteenth Amendment, is secured if laws do not subject individuals to an arbitrary exercise of the powers of government. *Missouri P. R. Co. v. Mackey* (1888), 127 U. S. 205, 32 L. Ed. 107, 8 S. Ct. 1161. The words "due process" refer to that law of the land in each state which derives its authority from inherent and reserved powers of state, exerted within limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. *Re Kimmler* (1890), 136 U. S. 436, 34 L. Ed. 519, 10 S. Ct. 930.

Terrace West, Inc., was not afforded this basic due process in the proceedings which took from it a parcel of land; proceedings strictly in accord with the relevant sections of the EDPL. As is set forth in the history of the case, above, the same entity—the Condemnor City of Plattsburgh—originated the plan to take the Terrace West driveway; held the public meeting to inform the public and review the public use to be served by the proposed project, pursuant to EDPL §201; conducted the public meeting, pursuant to EDPL §203; and made a determination and findings as to the proposed project, pursuant to EDPL §204. Thus, the only hearing conducted prior to the taking was conducted by the legislature which had in fact authorized the taking and had commenced the proceeding; there was a merger of the prosecution and the judiciary. There was no impartial tribunal. Petitioner is not claiming that it is entitled to a jury trial, it concedes that it has long been settled that there is no constitutional right to a jury in Eminent Domain proceedings. *U. S. v. Reynolds*, 397 U. S. 14, 25 L. Ed. 2d 12, 90 S. Ct. 803. Petitioner is claiming that at some point in the proceedings, a determination must be made by a neutral party, a third party, an impartial party.

Under the relevant provisions of the EDPL, the Court has two functions. Pursuant to §207, any aggrieved party can seek judicial review of the condemnor's findings and determination in the appropriate Appellate Division. However, in this review, there is no testimony taken under oath for the Court to review, no admissible evidence upon which a decision can be made. The condemnee is not able to cross-examine witnesses. The Court has only the Condemnor's written transcript of the record of the proceedings, and its determination and findings, upon which to decide whether to confirm or reject the condemnor's

determination and findings. The landowner is not afforded due process by this provision.

The second occasion upon which the Court becomes involved in these proceedings is, when, pursuant to §402 (b) of the EDPL, the condemnor petitions the Court for an order permitting it to file an acquisition map and to acquire the property. As is set forth above, the Court's only obligation here is to review the proof of service and determine if the procedural requirements of the law have been met. The landowner is not afforded an opportunity to defend on the merits, to argue the alleged necessity for the taking of the land. The Court acts as a rubber stamp.

The sections of the Eminent Domain Procedure Law discussed above are facially and in effect unconstitutional. Terrace West, Inc., was deprived of its right to due process in the taking from it of its property. The EDPL sections complained of herein subject individuals to an arbitrary exercise of the powers of government; the State's authority is exerted in excess of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.

Articles 2 and 4 of the New York Eminent Domain Procedure Law are unconstitutional, they have deprived petitioner Terrace West, Inc., of its property without due process of law. These articles must be struck down as unconstitutional, and Terrace West, Inc., granted relief.

Respectfully submitted,

J. BYRON O'CONNELL
O'CONNELL & WOLFE
Attorneys for Petitioner
10 Healey Avenue
Plattsburgh, N. Y. 12901
(518) 561-1440